

opinion, by the inferences to be drawn from the documents and the probabilities of the matter. I am not unmindful in considering this aspect of the case of the need to approach with considerable caution a claim founded on secondary evidence of an alleged written contract but in the light of the clear and unequivocal findings of fact of the trial judge the matter is beyond doubt.

In the result, therefore, for these reasons the appeal must, in my judgment, be dismissed with costs.

Wee Chong Jin C.I. and Tan Ah Tah F.J. concurred.

Appeal dismissed.

Solicitors: C. J. Koh & Co.; Donaldson & Burkinshaw.

HO TONG CHEONG & ORS. v. OVERSEA-CHINESE BANKING CORPN. LTD.

[F.C. (Wee Chong Jin C.J., Tan Ah Tah F.J. and Buttrose J.) April 6, 1967]

[Singapore — Federal Court Appeal No. Y48 of 1966]

Landlord and Tenant — Building operations by tenants on controlled premises in breach of statute — “Knowingly” committing breaches — Exposing landlord to any penalty, fine or forfeiture — Action for recovery of possession by landlord — Municipal Ordinance (S.S. Cap. 133), s. 144(7), (10) & (12) — Building by-laws — Control of Rent Ordinance (Cap. 242), ss. 14 & 15(1) (h).

Evidence — Election to call no evidence at trial — Fact especially within the knowledge of person — Burden of proof — Evidence which could be produced — Unfavourable presumption against withholding — Evidence Ordinance (Cap. 4), ss. 107 & 115(g).

This was an appeal against the judgment of the High Court allowing the respondent's claim for possession of certain controlled premises of which the appellants were monthly tenants on the ground that they had knowingly committed breaches of the Municipal Ordinance and the Building By-laws and had thereby exposed the respondents to a penalty or fine. It was not in dispute that the appellants commenced and completed building operations on the premises without submitting a plan to the proper authority and that they had breached section 144(7) of the Municipal Ordinance and the Building By-laws. The appellants argued that it had not been established that they committed the breaches “knowingly” and that the breaches exposed the respondent to a penalty, fine or forfeiture.

Held: (1) in view of the trial judge's positive finding of fact that the appellants carried out the building operations knowing full well that they were illegal, the respondents must be held to have succeeded in making out a case on any of the interpretations of the word “knowingly” previously considered by our courts;

(2) exposure to penalty, fine or forfeiture means that there must be exposure to conviction. Exposure to prosecution is not enough and there is no exposure to conviction unless facts exist which would support a conviction. The trial judge appreciated the position because he came to the conclusion that the breaches committed by the appellants would if made out in proceedings

against the respondent, lead to its conviction which would in its turn lead to a penalty, fine or forfeiture.

Per Curiam: “the object of the Control of Rent Ordinance is to fetter landlords and take away their common law rights and not to afford the tenant a statutory defence. Immediately the appellants committed a breach as outlined in section 15(1)(h) of the same Ordinance, they lost the protection given to them by the Ordinance and laid themselves open to ejection by the respondent which may at any time thereafter determine the contractual tenancy and recover possession of the premises from the appellants”.

Observations on the effect of section 107 of the Evidence Ordinance.

Cases referred to:—

- (1) *Sarah Cashin v. Goh Kah Seng* [1955] M.L.J. 52 at p. 55.
- (2) *Nathan Brothers v. Tong Nam Contractors Ltd.* [1959] M.L.J. 240 at p. 241.
- (3) *Zbytniewski v. Broughton* [1956] 3 All E.R. 348.
- (4) *Chung Lai Heng v. Murugappa Chettiar* [1952] M.L.J. 232.
- (5) *Ang Ah Bak v. S.E.A.C. Co.* [1966] 2 M.L.J. 45 affirmed by F.C., *sub nom. S.E.A.C. Co. v. Ang Ah Bak* [1967] 1 M.L.J. 170.
- (6) *Hooi Chuk Kwong v. Lim Saw Choo* [1958] M.L.J. 5 at p. 8.

FEDERAL COURT.

Tan Peng Khoo for the appellants/defendants.

S. H. D. Elias for the respondent/plaintiff.

Cur. Adv. Vult.

Buttrose J.: In this action the plaintiff claimed possession of premises at No. 203, South Bridge Road, Singapore, of which the defendants were monthly tenants on the ground that they had knowingly committed breaches of the Municipal Ordinance and the Building By-laws made thereunder affecting the premises which exposed the plaintiff to a penalty or fine.

Section 14 of the Control of Rent Ordinance (Cap. 242), (hereinafter referred to as ‘the Ordinance’), provides that “no order or judgment for the recovery of possession of any premises comprised in a tenancy shall be made or given except in the cases set out in this Part of this Ordinance”.

The plaintiff claimed it was entitled to possession under section 15(1)(h) of the Ordinance which reads as follows:—

“15(1) In the case of all premises such an order or judgment as is referred to in section 14 of this Ordinance may be made in any of the following cases, namely:—

- (h) where the tenant or any other person occupying the premises under him has knowingly committed a breach of any written law regulating any business carried on upon the premises or of any provision of the Municipal Ordinance or of any rule or by-law made thereunder affecting the premises which exposes the landlord to any penalty, fine or forfeiture.”

The plaintiff's case was that by virtue of section 144(12) of the Municipal Ordinance

which was in force at the material time, namely, in July, 1961, the building operations commenced or carried out by the defendants were deemed to have been commenced or carried out by it and it was liable for breaches and by section 144(10) of the same Ordinance it was liable to a fine and a mandatory order might be made requiring it to alter or demolish the building.

The defendants admitted that they commenced and carried out the building operations particulars of which were set out in the statement of claim and that the work was commenced and completed in July, 1961. Further it was not in dispute that the defendants carried out the work without submitting a plan to the proper authority or that there was a breach of section 144(7) of the Municipal Ordinance or that the work carried out constituted breaches of the Building By-laws.

It was argued that it had not been established in this case that the defendants committed the breaches 'knowingly' as required by the section. This raised a clear cut issue of fact and was dealt with by the trial judge in this way:—

"In this case the evidence is that in November, 1960, the defendants submitted a plan signed by themselves, their architect and the plaintiffs to the proper authority. The plan was for the alteration to the shop front of the premises. In April, 1961, an amended plan was submitted. Both these plans show an unauthorised glass corrugated iron lean-to roof over the open area at the back of the premises which was to be demolished. The plans were approved on 21st November, 1960, and 19th May, 1961, respectively. In July, 1961, the defendants carried out the building operations over the open area at the back of the premises knowing full well that a covering over the open area was illegal. There is no doubt about it that the defendants committed the breaches knowingly."

I am unable to find any reason for disturbing the trial judge's finding of fact with which I am in complete agreement.

In the light of this finding and in the circumstances of this case it is unnecessary to consider or pronounce upon the precise interpretation to be placed on the word 'knowingly'.

In *Sarah Cashin v. Goh Kah Seng* ⁽¹⁾ Whitton J. interpreted it in this way:—

"... the effect of adding the word 'knowingly' appears to be that before a tenant is deprived of this protection not only must he have committed a breach which exposes his landlord but also he must have known that he was committing a breach at the time of doing so."

In *Nathan Brothers v. Tong Nam Contractors Ltd.*, ⁽²⁾ Ambrose J. in accepting the interpretation adopted by Whitton J. said:—

"I accepted the above-cited interpretation of the word 'knowingly' by Whitton J. and came to the conclusion that, before the defendants could be deprived of the protection of the Ordinance under section 15(1)(h) they must be proved to have known that they were committing a breach of the Municipal Ordinance at the time of doing so."

In the case before us the trial judge indi-

A cated that he thought Ambrose J. had gone too far and went on to say:—

"In my view it cannot be read into paragraph (h) that only people who knew the provisions of the Municipal Ordinance are covered by the paragraph. The word 'knowingly', in my view, qualifies the nature of the act and it merely means that a defendant knew what he was doing, that is, he did it consciously or intentionally."

B In view of the trial judge's positive finding of fact to which I have referred that the defendants carried out the building operations knowing full well that they were illegal and there was no doubt that they committed the breaches knowingly his statement is pure *obiter* and I do not wish to be thought that I necessarily accept it.

C Suffice it to say that in any event and on anyone of these interpretations of the word 'knowingly' the plaintiff, in my opinion, has succeeded in making out a case.

D Before leaving this aspect of the case I think I should refer to the fact that the defendants elected to call no evidence at the trial. In these circumstances the trial judge was entitled to consider the effect of section 107 of the Evidence Ordinance which provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. E The fact as to whether the defendants knowingly committed the breaches complained of was surely something especially within their own knowledge. Furthermore there was the presumption provided by section 115(g) of the same Ordinance that the court may presume that evidence F which could be and is not produced would, if produced, be unfavourable to the person who withholds it.

G I turn now to deal with the defendants' argument that the plaintiff failed to establish that these breaches exposed it to a penalty, fine or forfeiture.

H The argument proceeded on these lines. In July 1961 the law in force regarding building operations was the Municipal Ordinance and the Local Government Ordinance. Both these Ordinances were repealed on the coming into force of the Local Government Integration Ordinance in September, 1963. It is true that by virtue of section 144(12) of the Municipal Ordinance the owner of the land was liable for the breaches committed by his tenant but by section 392 of the same Ordinance no person was liable to any fine or penalty unless a complaint respecting the offence was made within twelve months. It was I contended that the plaintiff was only exposed to a penalty, fine or forfeiture when a complaint was made and one never was and now never could be made in this case.

Furthermore, there was a substantial alteration in the law regarding the liability of the owner for by section 167(17) of the Local

Government Ordinance which came into force in 1957 the owner was liable only if the person who actually commenced or carried out the work was not known or could not be found. Under the Local Government Integration Ordinance now in force the person liable is not the owner but the person who actually carried out the work and by section 179 of that Ordinance the defendants in this case are not now liable to a fine or penalty as a complaint was not made within the prescribed period of three years next after the date of the commission of the offence.

It was argued that in determining whether the plaintiff was entitled to possession under section 15(1)(h) of the Ordinance the court must look at the facts existing at the time the contractual tenancy was terminated, namely, on the 31st October, 1964, or at the time when the writ was issued, namely, the 1st March, 1965, and that on neither of these dates was the plaintiff exposed to any penalty, fine or forfeiture.

In support of this proposition reliance was placed on *Zbytniewski v. Broughton*.⁽³⁾ This case turned on the construction of section 65(1) of the Housing Act, 1936 which provides that where a dwelling house is overcrowded in such circumstances as to render the occupier thereof guilty of an offence, nothing in the Rent and Mortgage Interest Restriction Acts, 1920 and 1933, shall prevent the landlord from obtaining possession of the house. It was held that on the true construction of section 65(1) the restriction on recovery of possession imposed by the Rent Acts was removed only while an offence of overcrowding continued; in that case there was not overcrowding "in such circumstances as to render the tenant guilty of an offence" within section 65(1) at the date which was the material date, namely, the date of the trial, and accordingly the landlord was not entitled to possession but as Hodson L.J. pointed out at p. 357 "... the whole purpose of that Part of the Act has to do not with the assistance of landlords or with the protection of tenants but with the prevention of overcrowding."

In the present case the trial judge dealt with the point in this way. He said:—

"The object of the Rent Control Ordinance is to fetter landlords and take away their common law rights and not to afford the tenant a statutory defence. In my view immediately a tenant commits a breach of any written law regulating any business carried on upon the premises or of any provision of the Municipal Ordinance or any Rule or By-law made thereunder affecting the premises he removes the fetter on the landlord's right to recover possession and he loses the protection of the Ordinance and the landlord's right of action for recovery of possession arises."

Support for this view, with which I agree, is found in *Chung Lai Heng v. Murugappa Chettiar*⁽⁴⁾ and *Ang Ah Bak v. S.E.A.C. Co.*,⁽⁵⁾ which was upheld by the Federal Court.

Once the defendants committed a breach as

A outlined in section 15(1)(h) of the Ordinance they immediately lost the protection given them by the Ordinance and laid themselves open to ejection by the plaintiff bank which may at any time thereafter determine the contractual tenancy and recover possession of the premises from the defendants.

B I think perhaps I should add that exposure to a penalty, fine or forfeiture means that there must be exposure to conviction, exposure to prosecution is not enough, and there is no exposure to conviction unless facts exist which would support a conviction. This was made clear in the Federation Court of Appeal decision in *Hooi Chuk Kwong v. Lim Saw Choo*⁽⁶⁾ which on this point dissented from the judgment of Whitton J. in *Sarah Cashin v. Goh Kah Seng*, *supra*.

C The trial judge appreciated this position because he arrived at the conclusion, with which I agree, that the breaches committed by the defendants would, if made out in proceedings against the plaintiff, lead to its conviction which would in its turn lead to a penalty, fine and forfeiture.

D There was no substance in the other points argued on behalf of the appellants.

E For these reasons, in my view, the decision of the trial judge was right and the appeal must be dismissed with costs.

Wee Chong Jin C.J. and Tan Ah Tah F.J. concurred.

Appeal dismissed.

F Solicitors: Oehlers & Choa; Elias Bros.

ATTORNEY-GENERAL at & by the relation of
PESUROHJAYA IBU KOTA*, KUALA
LUMPUR v. WAN KAM FONG & ORS.

G [O.C.J. (Raja Azlan Shah J.) April 8, 1967]

[K.L. — Civil Suit No. 169 of 1967]

H *Practice and Procedure — Relator action — Attorney-General — Whether has power and competent to act as plaintiff at the relation of Pesurohjaya, Ibu Kota, Kuala Lumpur — Whether proper person to institute proceedings — Consent of relator — Failure to file, at time of filing writ — Relator a corporation sole — Consent not sealed — R.S.C. 1957, O. 16 r. 20 — Federal Capital Act, 1960, s. 4.*

Constitutional Law — Attorney-General — Powers and duties of — Relator action to remedy a public wrong — Malaysia Constitution, arts. 145, 160 & 162.

I The defendants were alleged to have committed breaches of certain bye-laws by carrying on a restaurant business without a licence being issued by the Pesurohjaya. In respect of these breaches they were twice prosecuted, convicted and fined. In spite of these convictions they have persisted in carrying on their restaurant business without a licence. To restrain them from further committing these breaches the Attorney-General

* Commissioner of the Federal Capital.